No. 80-1884

IN THE

Supreme Court Of The United States

OCTOBER TERM 1980

MEMOREX CORPORATION, et al.,

Petitioners,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

REPLY BRIEF OF MEMOREX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IBM's Brief in Opposition to Petition for Writ of Certiorari, in its attempt to downgrade the importance of the decision below, actually demonstrates why the writ should be granted. IBM begins its opposition by claiming there is no "conflict" because a number of federal judges have held in favor of IBM. These judges, however, (with the exception of District Judge Schnacke in the *Transamerica* case), decided in favor of IBM on purely legal grounds, either in the context of appellate review, or in ruling on motions for summary disposition. All of the judges are from the Ninth and Tenth Circuits, circuits that have adopted a cost-based rule for *per se* legality.[1] Naturally, circuit and district court judges in a particular circuit will adhere

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* The listing required by Rule 28.1 appears at footnote 1 of the Petition.

[1] In addition to the Ninth Circuit cases cited at footnote 31 of the Petition, see *Murphy Tugboat Co. v. Crowley*, 1981-1 Trade Cas. ¶ 64,000, p. 76,193 (9th Cir. 1981); *cf. Island Tobacco Co., Ltd. v. R. J. Reynolds Industries, Inc.*, 1981-1 Trade Cas. ¶ 63,988 (D. Hawaii 1981)

to rules announced by prior panels within the same circuit. This is exactly what happened when this case was affirmed solely on the basis of the decision in *CalComp*.

The conflict noted by Memorex as a reason for granting the writ is one between circuits, not between judges in the circuits that have adopted the *per se* test. Memorex submits that if the case had been tried and reviewed in a circuit that had rejected the cost-based *per se* rule, the result would have been a unanimous jury verdict in favor of Memorex rather than the nine to two deadlock, and affirmance by the Court of Appeals.

IBM makes the further argument that the decisions in favor of IBM were correct because ". . . IBM's lower prices were fairly anticipated to return profits well in excess of IBM's total costs." (Opposition, p. 3) IBM then attempts to support this argument with a footnote (p. 4, ftn. 6) claiming that "undisputed evidence" showed the profitability of the IBM products at issue. The so-called "undisputed evidence" was introduced by IBM and was "profitability" that had been "estimated" by IBM. Memorex introduced substantial evidence to rebut this claim, including evidence from which the jury could readily have inferred that IBM's "estimates" were greatly inflated, that IBM intentionally sacrificed revenues and profits in order to inflict even greater losses on competitors, and that in the case of one product (the 3705), IBM's prices were below average total cost.

Most important, if, as below, a monopolist's own estimates of profitability are the deciding factor in a Section 2 case, the "profitability" test is nothing more than a blanket rule of *per se* legality for a monopolist that destroys competitors with a course of conduct that includes price cuts. If the price cuts are estimated to be "profitable", the analysis comes to an end with judgment for the monopolist. There is no consideration of the structure of the market, no review of the evidence of anti-competitive intent of the monopolist, no study of the inter-

relationship of the various acts that make up the course of conduct, and no regard to other factors that would have to be included within a rule of reason analysis.

Any mechanistic cost-based *per se* ruled based upon estimated profitability thus provides an absolute safe harbor for a price cutting monopolist. Any firm with monopoly power can "estimate" that its price cuts will be profitable; and with current accounting methods no injured plaintiff can second guess that prediction at trial, especially when the defendant is a large multi-product firm with complex cost allocation systems.[2]

Adoption of a mechanistic cost-based rule would certainly end "conflict," and would extend the result reached by the Ninth and Tenth Circuits to the entire federal judiciary. The question for this Court is whether such a rule of law—which ignores the importance of intent and other factors in a rule of reason analysis—is compatible with the basic goals of Section 2 of the Sherman Act.[3]

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[2] The leeway given IBM with such a test is set out in detail in the "Brief of Transamerica Computer Company, Inc. as *Amicus Curiae* in Support of Petition for Writ of Certiorari" at pp. 9-14.

[3] IBM claims that *Memorex/CalComp* were decided under a rule of reason standard and therefore review of the *per se* cost-based rules in this case would be inappropriate. (Opposition, p. 4) This is clearly not true. As shown in our petition, although the Court in *CalComp* announced a "rule of reason" standard as the general rule for monopolization, when price cuts are involved, the reasonableness of the activity is based upon a cost-based formula, whether it be marginal cost, or general conclusions that the price cuts in issue were "profitable." See Appendix, p. A-93-94, footnote, n. 19; A-95; A-96; A-97; A-98-100. After reaching the conclusion that the price cuts in issue were "profitable," the Court affirmed the directed verdict without any consideration of IBM's anticompetitive intent, or the other factors that must be considered in a rule of reason analysis.

We, therefore, respectfully submit that a Writ of Certiorari should issue and that the decision of the court below should be reversed.

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